

Key Takeaways from the Building Safety Bill 2021

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Background

Building safety has been at the forefront of the construction industry's mind since the tragic Grenfell Tower fire in West London on 14 June 2017. The tragedy exposed serious and systematic failings in the construction and management of high-rise residential buildings and has given rise to homeowners facing significant bills for replacement of cladding and other defects.

The Building Safety Bill (the "Bill") is one of a number of measures intended to improve the regulatory regimes and standards for building and fire safety in the future in high-rise residential buildings by ensuring that there will always be someone responsible for keeping residents safe. The revised Bill published on 5 July 2021 is a product of the independent review of the Building Regulations and fire safety led by Dame Judith Hackitt, and her subsequent final report 'Building a Safer Future', published in May 2018. As of 5 July 2021, the Bill has reached its First Reading in the House of Commons, and Royal Assent is anticipated in 9-12 months. Thereafter, the measures set out in the Bill will be made law by way of secondary legislation over a further period of up to 18 months.

Impact

On 5 July 2021, Housing Secretary Robert Jenrick outlined the overarching aim of the Bill, which is designed to give residents in tower blocks more power to hold builders and developers to account, to establish a new regime for building safety regulation and to toughen sanctions against those who threaten residents' safety.

The measure grabbing the headlines is the extension to the time period within which homeowners may claim compensation from developers under the Defective Premises Act (the "DPA") for defects that render a dwelling unfit for habitation. It is proposed that the limitation period will extend to 15 years from the date of completion of the building. Crucially, this will apply retrospectively meaning that claims could be brought in respect of properties completed up to 15 years prior to this change coming into effect.

Assuming secondary legislation enacts the limitation extension on say 1 July 2022 it will mean that claims could (theoretically at least) still be brought, just, for buildings completed in early July 2007. However, homeowners in properties completed in the latter part of 2006 and early 2007 may lose out unless the enactment of this provision is expedited.

In *Rendlesham Estates Plc v Barr Ltd [2014] EWHC 3968 (TCC)*, the court provided guidance as to the applicable standard to be met for a dwelling to be 'fit for habitation'. Applying the court's guidance, where dwellings cannot be occupied for a reasonable time without risking the health and safety of the occupants then such dwellings are unlikely to be deemed fit. This would cover many of the residential buildings currently suffering with serious fire safety defects including those, for example, that have insufficient fire stopping and or incorporate unsafe combustible materials where appropriate safety measures have not been put in place.

Whilst the extension should be welcomed by homeowners, it is important to remember that homeowners pursuing DPA claims will bear the burden of proving that dwellings are 'unfit for habitation'. Accordingly they will need supporting evidence from appropriately qualified experts. Challenges in this regard are illustrated by the recent case of *Naylor v Roamquest Ltd [2021] EWHC 567 (TCC)*, which involved allegations by leaseholders with combustible cladding installed in residential flats in Greenwich. Faced with the impending expiry of the limitation period for bringing a claim, the leaseholders of 82 of 1,002 residential flats issued a claim against the freeholder and builder. The basis of the claim was a lack of documents proving the absence of defects. Rejecting the claim as presented, the court said it was improper for the leaseholders to bring a claim on such a basis and that the onus was upon them to carry out investigations to identify defects with precision. The court was not sympathetic to the pressures imposed by the impending expiry of the limitation period and confirmed that this could not relieve the claimants of their burden of pleading and establishing a positive case. The court did, however, allow the claim to continue on the basis that the leaseholders amended their statement of case (with support from investigations and expert reports).

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In addition to the extended limitation period for DPA claims, if enacted, the Bill will introduce the following measures:

- 'Higher-risk buildings' will be regulated throughout the design, construction and refurbishment phases of a building's lifecycle.
- A Building Safety Regulator will be established to oversee the regulatory regime and hold people who break the rules and do not properly manage building safety risks to account.
- Building owners will be required to manage safety risks, with clear lines of responsibility for safety during design, construction, completion and occupation of high-rise buildings. This ensures that people who are responsible for the safety of high-rise residential buildings are clearly identifiable.
- There is a 'hard stop' in each phase of the construction work – from planning, to pre-construction and design, to the completion stage – so those building or carrying out significant refurbishment works to high-rise residential buildings will be required to seek approval from the Regulator before they are able to proceed with the next phase of work.
- Linked to this is the requirement for a 'golden thread' of information stored digitally, with safety considered at every stage of a building's lifetime including during the earliest stage of the planning process.
- The Bill will strengthen the construction products regulatory regime, with new requirements to make sure more products are safe, while paving the way for a National Regulator for Construction Products, i.e. the Office for Product Safety and Standards (OPSS), to oversee and enforce the rules.
- Leaseholders are protected from exploitation over remediation costs by requiring building owners to explore alternative ways to meet the costs and provide evidence that this requirement has been met.
- The Bill mandates developers to join and remain members of the New Homes Ombudsman scheme. It gives residents in high-rise buildings to have more say in the management of their building. They will be able to raise building safety concerns directly to the owners and managers of buildings, who will have a duty to listen to them. If residents feel concerns are being ignored, they can raise them with the Building Safety Regulator.
- Those who fail to meet their obligations may face criminal charges. Where an offence has been committed by a corporate body, the individuals directing or managing a company can be held criminally liable.

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10 Key Takeaways

We set out the ten key features that you would want to know about the Building Safety Bill 2021:

1. The new regulatory regime will regulate 'higher-risk buildings' in England

'Higher-risk buildings' is defined in the Bill as generally a building of at least 18 metres in height or 7 storeys and of a description specified in the regulations. A building that fits the description set out in the Bill will be regulated during the design, construction and refurbishment phases of a building's lifecycle.

It is worth noting that the definition of 'higher-risk buildings' is not confined to the above. If the relevant building meets the following three conditions, then the Building Safety Regulator (BSR) must recommend that it falls into the description of 'higher-risk buildings' for the purposes of the Bill:

- a. the building safety risks in the type of building in question are higher than in buildings in general;
- b. if the prescribed building safety risks arose in the type of building in question it could cause a major incident (serious injury or death to a significant number of people); and
- c. the BSR considers it appropriate for the regulatory regime to apply.

2. All homeowners will have up to 15 years to claim compensation for sub-standard construction work or unacceptable defects

This is the one of the most significant reforms introduced under the Building Safety Bill and one that has made the front page news since the announcement by Housing Secretary Robert Jenrick on 4 July 2021. The reform more than doubles the amount of time, from six to 15 years, for residents to seek compensation for 'shoddy workmanship or refurbishments which make the home unliveable'.

This 15-year limitation period will apply to two claims under two separate pieces of legislation:

- a. Defective Premises Act 1972, Section 1
 - The extended limitation period will apply both prospectively (i.e. in respect of future work) and retrospectively (i.e. in respect of work that has already taken place).
 - By way of illustration, owners of dwellings completed in 2010 that are unfit for habitation due to construction defects could bring proceedings against the housebuilders within a period of 15 years from the date of completion (ie up until 2025).
 - Where the revised limitation period would expire within 90 days of the date when the section of the Act extending the limitation period comes into force, the Act provides that it will last for a full 90 days from that date. This is intended to give potential claimants the necessary time to take advice and lodge a claim.
 - In *Rendlesham Estates Plc v Barr Ltd [2014] EWHC 3968 (TCC)*, the court provided guidance on the term 'fit for habitation': where dwellings cannot be occupied for a reasonable time without risking the health and safety of the occupants then such dwellings are unlikely to be deemed fit for habitation. This would encompass many of the residential buildings suffering from serious fire safety defects including those that have insufficient fire stopping and or incorporate unsafe combustible materials.
 - It is important to remember that homeowners pursuing Defective Premises Act claims will bear the burden of proving the dwellings are 'unfit for habitation' and will need evidence from appropriately qualified experts. The challenges in this regard are illustrated by the case of *Naylor v Roamquest Ltd [2021] EWHC 567 (TCC)*, which involved allegations by leaseholders of defects in combustible cladding installed in residential flats in Greenwich. Faced with the impending expiry of the limitation period for bringing a claim the leaseholders of 82 of

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1,002 residential flats issued a claim against the freeholder and builder. The basis of the claim was the absence of documents proving the absence of defects and the leaseholders claimed all costs of remedial works to the buildings. Rejecting the claim the court said it was improper for the leaseholders to bring a claim on such a basis and that the onus was upon leaseholders to identify defects with precision. The court was not sympathetic to the pressures imposed by the impending expiry of the limitation period and confirmed that this could not relieve the claimants of their burden of pleading and establishing a positive case. The court did, however, allow the claim to continue on the basis that the leaseholders amended their statement of case (with support from investigations and expert reports).

b. Building Act 1984, Section 38 (Civil liability)

- The extended limitation period will also apply prospectively to actions under section 38 of the Building Act 1984, although that section of the Building Act is yet to be enacted and it is not clear whether it is intended to be enacted. Section 38 provides that a breach of the Building Regulations is actionable but only if such breach causes damage.
- Even if section 38 of the Building Act is enacted the requirement for "damage" before a breach is actionable severely limits the application of the provision where a building is simply suffering from construction defects.

Using the extended limitation period as a means of compensating homeowners of defective properties has attracted controversy on the basis that it is the homeowners who bear the burden (and cost) of pursuing claims with an uncertainty of outcome due to the inherent 'litigation' risk. In addition, in some cases the developers from whom compensation is sought may no longer exist or may be insolvent.

3. Establishment of a Building Safety Regulator (BSR)

A crucial feature of the Building Safety Bill is the establishment of a new BSR who will sit within the

Health and Safety Executive (HSE).

The Building Safety Regulator will have two objectives focused on securing the safety of people in and around buildings, and improving building standards.

The three core principal functions of the BSR are:

- a. To implement the new, more stringent regulatory regime for higher-risk buildings;
 - The BSR will be the *building control authority* in England in respect of building work, will oversee and enforce the new regime, and be responsible for all regulatory decisions under the new regime during the design, construction, occupation and refurbishment of higher-risk buildings in England.
 - They will do this by working closely with, and taking advice from, other regulators and relevant experts in making key decisions throughout the lifecycle of a building.
 - They will also have power to bring together other teams including Fire and Rescue Services and local authority expertise (notably Local Authority Building Control teams) to assist it in making regulatory decisions.
- b. To oversee the safety and standard of all buildings;
 - Firstly, the BSR will oversee the performance of the building control sector, developing key performance indicators (KPIs) to regulate the sector, data collection and it will be empowered to impose sanctions for poor performance.
 - Secondly, the BSR will have to understand and advise on existing and emerging building standards and safety risks including advising on changes to regulations, changes to the scope of the regime and commissioning advice on risks in and standards of buildings.
- c. To assist and encourage competence among the built environment industry and registered building inspectors through:

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- Better regulations – the BSR's functions will include establishing and setting the strategic direction of the proposed industry-led competence committee, carrying out research and analysis and publishing non-statutory advice and guidance.
- Creating a more unified building control profession – the BSR will impose competence requirements by requiring professionals to meet minimum criteria in order to be placed on the register that will be common across both public sector (local authorities) and private sector (registered building control approvers, currently known as Approved Inspectors). For example, under the new regime, a party carrying out building works on a higher-risk building will not be able to choose its own building control body – the BSR will supervise building control work for such buildings.

4. Specific duties imposed on various 'dutyholders' from design and construction stages, through to occupation in higher-risk buildings

The Building Safety Bill sets out a framework of duties for 'dutyholders' namely those who procure, commission, plan, design, manage and undertake building work across the lifecycle of higher-risk buildings.

This is to ensure that 'dutyholders' engage with the requirements and the safety and performance outcomes they are trying to secure, and do not view building regulations as a tick-box exercise. The Bill also requires mandatory occurrence reporting (MOR) to be undertaken so all structural and fire safety occurrences must be reported by the relevant dutyholder to the BSR. Where there is a failure to comply, the person or entity responsible will be held to account by all those who have a stake in the project.

- a. *Dutyholders* – there are 5 categories of 'dutyholder' during the construction phase. The same roles already exist under the *Construction (Design and Management) Regulations 2015*, but new responsibilities will be imposed on those

parties for the fire and structural safety of the building.

- i) *Client* – Often the Client will be the developer or the building owner. Where there is more than one contractor working on the project, the Client will need to appoint a Principal Designer to be in control of design work and a Principal Contractor to be in control of the whole project during the construction phase. The Client will need to be assured that the Principal Designer/ Principal Contractor have the right competencies (the skills, knowledge, experience and behaviours or organisational capability) for the work, and ensuring those they appoint have systems in place to ensure compliance with building regulations.
- ii) *Principal Designer* – The Principal Designer is in control of the pre-construction phase, when most design work is carried out. Its role is to plan, manage and monitor the design work and to coordinate their work with the Client, the Principal Contractor and other designers.
- iii) *Principal Contractor* – The Principal Contractor is in control of the construction phase. Its role is to plan, manage and monitor the building work and co-ordinate between the dutyholders and liaise with the Principal Designer.
- iv) *Designer* – The Designer carries on a trade, business or other undertaking in connection with which they/person instructed by the Designer will prepare or modify a design.
- v) *Contractor* – The Contractor manages or controls construction work (e.g. building, altering, maintaining or demolishing a building or structure). Anyone who manages this work or directly employs or engages construction workers is a contractor.

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- b. *Accountable persons* – The 'Accountable Person' is the dutyholder during occupation and may be an individual, partnership or corporate body. They have a duty to register any building that is within the scope of the new regime with the BSR before occupation. Existing occupied buildings will have to be registered within a fixed transition period once the new regime is in force.

The Accountable Person will have an ongoing duty to assess the building safety risks and take reasonable steps to prevent / control the impact of a major incident in the building caused by such risks, such as fire spread, structural failure and any other risk that may be prescribed by regulations in the future.

They will also have to apply to the BSR for a Building Assessment Certificate to satisfy the BSR that they are complying with the statutory obligations placed on them. The Accountable Person is required to display the most recent issue of the certificate in a prominent position in the building.

The Accountable Person will also have to produce a 'Safety Case Report' to demonstrate that they have assessed the building safety risks and show how they will meet its ongoing duty – this must be kept up to date as part of the process for issuing a Building Assessment Certificate or on request from the BSR. The BSR can issue a compliance notice if requirements are not met by the Accountable Person, and continued failure to comply with the notice means there is continued breach of the statutory obligation and criminal and/or Special Measures proceedings may ensue.

- c. *Building Safety Managers* – the Accountable Person will be required to appoint a competent building safety manager to run the building safely and support the Accountable Person in the day to day management of fire and structural safety of the building. The building safety manager may be an individual or organisation, and must have the organisational capability and relevant skills, knowledge, experience and behaviours.

An exception to this obligation is where an Accountable Person has the organisational

capability to deliver the role in-house (or requisite competence if it is an individual) and has confirmed this to the BSR.

The satisfactory appointment of a building safety manager will be considered by the BSR as part of the certification process for the Building Assessment Certificate. The BSR can veto the appointment. The building safety manager must inform the Accountable Person if they believe that the assessment of safety risks relating to the building is not valid or if they think more needs to be done to address/control the risks.

5. Implement specific gateway points at design, construction and completion phases

This new measure is to ensure safety risks are considered at the earliest stage of the planning process. This helps to drive the culture change needed across the industry to enable the design and construction of high-quality and safe homes in the years to come.

Those building, or carrying out significant refurbishment work to, residential high-rise buildings will be required to seek approval from HSE at three gateway points – these will create stop/go decision points where an assessment/inspection will be conducted, assessing the works/building against regulatory requirements, to ensure that building safety risks are being considered and standards are being complied with at every stage of design and construction.

The three gateways are:

- a. Planning permission – the person applying for planning permission will have to submit information with the planning application to show that fire safety requirements have been considered and incorporated into the proposals. Fire statements must be submitted on a form published by the Secretary of State (or a form to similar effect) and contain the particulars specified or referred to in the form. This form is accessible [here](#).
- b. Pre-construction – this is said to be a 'hard stop' in that building work cannot begin until the BSR is satisfied that the design meets the

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requirements of the building regulations and the safety management expectations within it are realistic.

- c. Completion/Final certificate – this occurs once building work has finished and building control assesses whether the work carried out complies with the building regulations. All prescribed documents and information relating to the as-built building must be passed to the Accountable Person. If the BSR is satisfied, it will issue a completion certificate.

Failure to obtain approval at a gateway point will mean that a project cannot proceed any further until HSE is satisfied that all requirements are now met and approval is obtained. Owners of existing buildings will be required to seek pre-occupation approval on a phased basis.

6. The 'golden thread' of information

The 'golden thread' of information regarding a building must be created, stored and updated as a building progresses through the 'gateways' and, beyond that, once residents are in occupation and throughout the building's lifecycle.

This information is to be held digitally and will capture and preserve the original design intent of the building and any subsequent changes made to the building.

The intention is to help establish clear obligations on owners and enabling swift action to be taken by the regulator, wherever necessary.

7. Power to strengthen the regulatory framework for construction products, underpinned by a market surveillance and enforcement regime led nationally by the Office for Product Safety and Standards (OPSS)

Under the new regime, all construction products that are placed on the market in the UK will fall under a regulatory regime in order to ensure that they are safe. This is intended to address gaps that have been identified in the current system of regulation for construction products in the UK and to unify the regulatory framework.

The national regulator (OPSS) will be able to withdraw any construction products from the UK

market that present safety risks (there is a statutory list of 'safety critical' construction products which would result in death or serious injury). The OPSS has power to prosecute or use civil penalties against any business that breaks the rules and compromises public safety.

8. Introduce legal requirements for building owners to source their own remediation costs before passing these onto leaseholders

Save in instances where there are specific lease provisions currently there is no general legal obligation on landlords to seek alternative forms of cost recovery for remediation works from third parties before passing this on to leaseholders. This Bill adds new duties on the landlord to seek other cost recovery avenues to finance remediation works.

An obvious source of funding is the £5 billion fund made available by the Government to remove / replace unsafe cladding for all leaseholders in residential buildings of 18 metres and over. We would expect that responsible building owners would be seeking to apply to this fund where applicable notwithstanding whether or not to do so was a statutory requirement. The real impact of this measure will be the extent to which landlords are required to take steps to pursue third parties such as developers, potentially pursuing litigation, before charging leaseholders for the cost of remedial works. In this regard the Landlords will be obliged to take reasonable steps. The Bill anticipates the issue of guidance as to what amounts to reasonable steps. To the extent that is unclear the determination of what amounts to reasonable steps will be an issue for the courts.

9. Developers to join and remain members of the New Homes Ombudsman scheme

The Bill requires developers to become, and remain, members of the New Homes Ombudsman Scheme and to provide information to new build homebuyers about the scheme, failing which there will be sanctions.

This will give the buyers of new build homes a statutory right to complain to the Ombudsman about developers who are part of the scheme and to have

their complaints investigated and determined. This also gives residents more routes to raise concerns about safety, and mechanisms to ensure their concerns will be heard and taken seriously.

The Ombudsman will hold developers to account and, if necessary, require them to pay compensation, failing which they may receive additional sanctions.

10. Non-compliance with the Building Safety bill will lead to criminal prosecution

Powers to enforce compliance with the provisions of the Building Safety Bill will be given to the BSR. It is anticipated that the HSE and BSR will be proactive in prosecuting those who fail to comply with the requirements and in imposing sanctions.

- For all offences in the Building Safety Bill and *Building Act 1984*, where an offence has been committed by a corporate body, directors and other officers of the company can be prosecuted personally if that individual consented to or 'connived in' the committing of that offence, or if the offence is deemed to be due to their neglect. The ability to make individuals directing or managing a company criminally liable in this way demonstrates the weight now being given to building safety responsibilities.
- The BSR has power to issue compliance notices (requiring non-compliant aspects of a building to be rectified) and, prior to completion of works

(during design and construction), it will be able to issue stop notices, meaning that work on a project will have to stop until the identified non-compliant work has been rectified – failing to comply will be a criminal offence. The maximum penalty will be two years in prison and an unlimited fine.

- The time limit within which enforcement action must be taken for contravention of the building regulations is extended from one year to ten years and for section 36 notices under the *Building Act 1984* (which require work that does not comply with the building regulations to be corrected). The Bill also replaces the existing summary-only, fine-only offence in section 35 of the *Building Act 1984* (penalty for contravening building regulations), making it triable either way (12 months or an unlimited fine in the magistrates' court, or unlimited fine and/or 2 years' imprisonment in the Crown Court), which removes altogether the time limit for bringing prosecutions for that offence.





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